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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1462

FLOYD H. DANIELS,

Petitioner,

vs.

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, a public corporation; and JACK R. GILSTRAP, as General Manager of the SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JAMES B. BERTERO,
One Wilshire Boulevard, Suite 2000,
Los Angeles, Calif. 90017,
(213) 629-3322,
Attorney for Respondents.

MUSICK, PEELER & GARRETT,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles, Phone 624-0231

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Statement of the Case.

In November, 1971, Petitioner filed a Petition for Writ of Mandate in the Los Angeles County Superior Court [C.T. 11] alleging the identical breach of contract which is the subject matter of this action [C.T. 13-17] against the Southern California Rapid Transit District (hereinafter "District") and its General Manager Jack R. Gilstrap (hereinafter "Respondents").

On October 10, 1972, Petitioner filed an Alternative Writ of Mandate in the State Court action [C.T. 19-20].

On November 20, 1972, Respondents filed a Motion for Summary Judgment in the State Court action [C.T. 23-92].

Said Motion was granted on November 30, 1972 [C.T. 95-96].

Petitioner filed a Notice of Appeal on January 22, 1973 [C.T. 96].

The judgment was affirmed. A copy of the decision of the Court of Appeal of the State of California appears at C.T. 94-102.

A hearing was denied by the California Supreme Court on April 24, 1974 [C.T. 104].

Petitioner filed a Complaint for Discriminatory Breach of Contract for Damages on January 28, 1975 [C.T. 1] in the United States District Court.

Although Petitioner alleged that he was discharged by the District approximately April 24, 1970 [Complaint, Paragraph 9, C.T. 3 and proposed Amended Complaint, Paragraph 10, C.T. 241], events showed that the District's Computer listed Petitioner as an employee until February 8, 1971 [C.T. 180].

Petitioner's Complaint alleged that the District violated *42 U.S.C.*, Section 1983 [C.T. 1] and *42 U.S.C.*, Section 1981 [C.T. 2, 5] when it fired him. The proposed Amended Complaint only alleges a violation of *42 U.S.C.*, Section 1981 [C.T. 239-245].

Respondents interposed a Motion to Dismiss and Motion for Summary Judgment (based on the ground that a California State action brought by Petitioner against the District and Mr. Gilstrap seeking reinstatement for the very same termination which is the subject matter of this action resulted in a judgment in their

favor which had become final) and, on April 17, 1975, the Motion to Dismiss was granted and the Motion for Summary Judgement was taken off calendar [C.T. 130]. The Trial Court, as reflected in the judgment entered April 24, 1975, found Petitioner's Complaint failed to state a claim upon which relief can be granted as the claims are barred by California's *Code of Civil Procedure*, Section 338(1) [C.T. 132].

Petitioner's Motion to Vacate Judgment was denied June 9, 1975 [C.T. 134].

An Amended Judgment was entered on June 12, 1975 [C.T. 135-136].

Petitioner's Motion to substitute himself in propria persona was granted on December 15, 1975 [C.T. 138-139].

On December 15, 1975, Petitioner filed a Motion to Vacate Judgment and Order, Motion for Leave to File Amended Complaint and a proposed Amended Complaint for Discriminatory Breach of Contract and on January 12, 1976 that Motion was denied [C.T. 210].

On January 21, 1976, Plaintiff filed another Motion for Leave to File Amended Complaint, Affidavit and proposed Amended Complaint [C.T. 211-247]. The Motion was denied on April 26, 1976 [C.T. 267] and the Order thereon entered on May 5, 1976 [C.T. 271]. Petitioner has appealed from that Order [C.T. 273].

I

Petitioner Did Not Properly Appeal.

The Memorandum Opinion of the United States Court of Appeal for the Ninth Circuit is set forth *in toto* in Petitioner's Appendix to Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit. Petitioner not having properly appealed, it is submitted that that Opinion should be dispositive and this Court should deny the Writ.

II

Petitioner's Motion to File an Amended Complaint Was Properly Denied.

Even if Petitioner had properly appealed, his underlying causes of action are barred by California *Code of Civil Procedure*, Section 338(1), which states:

> "Within three years:
>
> (1) An action upon a liability created by statute, other than a penalty or forfeiture."

Petitioner, in seeking leave to file an amended Complaint alleging a breach of contract inspired by racial discrimination, could only have such proposed Amended Complaint relate back in time to no earlier than the date of filing of his original Complaint on January 28, 1975. This date is more than three years from either April 24, 1970 (the date Petitioner alleges he was discharged) or February 8, 1971 (the date the District's computer finally eliminated Petitioner under the listing of employees). Respondents submit that the only issue to be decided is whether Petitioner is barred by the Statute of Limitations.

42 U.S.C., Section 1981, the Statute upon which Petitioner bottoms his proposed Amended Complaint, reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."

This Court has held that the appropriate limitations period for an action brought pursuant to *42 U.S.C.*, Section 1981, is the most appropriate one provided by the State in which the action is commenced.

> "Since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under §1981 the controlling period would ordinarily be the most appropriate one provided by state law. See O'Sullivan v Felix, 233 US 318, 58 L Ed 980, 34 S Ct 596 (1914) (Civil Rights Act of 1871); Auto Workers v Hoosier Corp. 383 US 696, 701-704, 16 L Ed 192, 86 S Ct 1107 (1966) (Labor Management Relations Act); Cope v Anderson, 331 US 461, 91 L Ed 1602, 67 S Ct 1340 (1947) (National Bank Act); Chattanooga Foundry v Atlanta, 203 US 390, 51 L Ed 241, 27 S Ct 65 (1906) (Sherman Act); Campbell v Haverhill, 155 US 610, 39 L Ed 280, 15 S Ct 217 (1895) (Patent Act)."

Johnson v. Railway Express Agency
421 U.S. 454, 462 [44 L.Ed.2d 295, 95 S.Ct. 1716 (1975)].

The Ninth Circuit has recognized that rule:

> "The pertinent provisions of the 1866 Civil Rights Act prescribe no period of limitations; hence, the

most nearly analogous state period of limitations applies. *See, e.g.*, United Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107, 16 L.Ed.2d 192 (1966) Young v. International Tel. & Tel. Co., 438 F.2d 757, 763 (3d Cir. 1971)."

"The most nearly applicable California statutes prescribe limitation periods not exceeding four years. *See* Cal. Code Civ.P. §§ 337, 338(1) (West 1972 Supp.) & 343 (West 1954). If any one of these statutes governs the longshoremen's § 1981 and §1985 actions, the filing of the complaint was decidedly tardy."

Griffin v. Pacific Maritime Association
478 F.2d 1118, 1119 (1973 9th Cir.).

Griffin did not enunciate which of the various California statutes of limitation was applicable since the most generous California statute was of four years duration and the Plaintiffs in *Griffin* were complaining about acts that commenced in 1946 and thus would be barred by any of the various statutes of limitation.

Respondents have been unable to locate a reported decision enunciating the appropriate statute of limitation period for a Section 1981 action where the State involved has a specific omnibus Statute of Limitations such as California *Code of Civil Procedure*, Section 338(1). However, Nebraska has a similar Statute of narrower application appertaining to Federal Statutes only which was operative in *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 228 (1976 8th Cir.) as follows:

"Nebraska has enacted a statute which clearly applies to actions founded upon federal statutes

such as § 1981 and § 1983. Neb.Rev.Stat. § 25-219 (Reissue of 1964) provides:

All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which actions no period of limitations is provided in such statute shall be commenced within three years next after the cause of action shall have accrued.

We are unable to conceive of any cogent reason why the clear wording of this statute precludes its application to the instant case, nor has plaintiff advanced any persuasive arguments to render the statute inapplicable. A Colorado statute similar to Nebraska's was applied in a § 1983 and § 1985 action in *Salazar v. Dowd*, 256 F.Supp. 220 (D. Colo. 1966). Tennessee has adopted a statute which establishes a one-year limitations period for actions 'brought under the federal civil rights statutes * * *.' Ten.Code Ann. § 28-304 (Supp. 1974); see Johnson v. Railway Express Agency, Inc. 421 U.S. 454, 456 n.2, 95 S.Ct. 1716, 1718 n.2, 44 L.Ed. 2d 295 (1975). We conclude that §25-219 governs in this case and, since plaintiff did not commence this action within three years of its accrual, his case was properly dismissed."

The Ninth Circuit has established that an action brought under *42 U.S.C.*, Section 1983, a companion to Section 1981, is controlled by *Code of Civil Procedure* Section 338(1) which provides a three year limitation. In *Smith v. Cremins*, 308 F.2d 187, 189-190 (1962 9th Cir.) the Court held as follows:

"The complaint was filed January 17, 1961. The incident upon which it was based is alleged to have occurred January 11, 1959. Since the Civil Rights Act contains no provision limiting the time within which an action may be brought under Section 1983, the applicable period of limitation is that provided by the statutes of California—the State in which the present action arose and the District Court was located. The District Court held that the appropriate California statute of limitations is California Code of Civil Procedure, Sections 340(3) and (6), which provides a one-year period applicable to actions for assault, battery, false imprisonment, and certain actions for damages for seizure of property. Appellant asserts that the appropriate California statute is Section 338(1) of the California Code of Civil Procedure, which provides that actions 'upon a liability created by statute' must be brought within three years.

"There are no decisions directly in point, and those most nearly analogous are inconclusive. The Court of Appeals for the Second Circuit, without discussion has applied the New York 'liability created by statute' limitation to an action under the Civil Rights Act, and the Court of Appeals for the Seventh Circuit has indicated that it would have applied that limitation to such an action had one been available in the statutes of Illinois. The Tenth Circuit, on the other hand, has applied the Kansas statute of limitations applicable to actions 'for injury to the rights of another, not arising on contract.'

"In determining which period of limitation to apply to an action under a particular federal statute,

the federal court accepts the state's interpretation of its own statutes of limitations, but determines for itself the nature of the right conferred by the federal statute.

"The California courts have held that an action is based 'upon a liability created by statutes,' within the meaning of Section 338(1), if the liability would not exist but for statute, or, conversely, an action is not based 'upon a liability created by statute' if the right is one which would exist at common law in the absence of statute. Though broadly stated, the distinction drawn is sufficiently discriminating for the present case.

"Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability. As Mr. Justice Harlan recently suggested, 'a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.'

"Practical considerations also support the selection of California's 'liability created by statute' limitation. According to Appellees' analysis, the single cause of action under the Civil Rights Act alleged in the complaint includes three distinct causes of action under State law and calls for the application of two distinct State statutes of limitations; appellant suggests still another possibility. Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action."

42 U.S.C., Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

42 U.S.C., Section 1981 likewise creates rights and imposes obligations different from any which would exist at common law. Respondents submit that *Code of Civil Procedure*, Section 338(1) applies to Section 1981 violations just as it does to Section 1983 violations.

Conclusion.

Respondents submit that the Petition for Writ of Certiorari should be denied for the following reasons:

1. Petitioner has failed to demonstrate that his Petition raises a sufficient question of concern or that it involves a question of application broader than the scope of his particular matter.

2. Petitioner did not properly appeal from the actions of the United States District Court.

3. The United States District Court was correct in determining that Petitioner's action is barred by the appropriate statute of limitations.

4. Even if Petitioner were successful at this he would still be faced with the insurmountable barrier that his dispute with Respondents is barred by the doctrine of *res judicata*.

Respectfully submitted,

JAMES B. BERTERO,
Attorney for Respondent.

MUSICK, PEELER & GARRETT,
Of Counsel.